LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 11 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-850

AHARON RON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER AHARON RON

WILLIAM J. BUTLER and
STANLEY GELLER
Counsel for Petitioner
400 Madison Avenue
New York, N.Y. 10017

April 9, 1974

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-850

AHARON RON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER AHARON RON

Petitioner Ron finds it necessary to submit this brief to respond to certain statements and points made in the Government's brief that are misleading.

I

THE STATEMENT THAT PETITIONER DOES NOT CHALLENGE THE SUFFICIENCY OF THE EVIDENCE AGAINST HIM

The Government does not discuss the evidence against petitioner Ron on the theory that he does not challenge the sufficiency of that evidence (Br., p. 5). The theory is hypertechnical, to say the least.

Petitioner Ron pointed out in his initial brief that the Government's case against him (to the effect that he participated in some degree in the sale of the allegedly stolen warrants, with knowledge that they had been "stolen") rested entirely on the trial testimony of the Government's witness Hagins (see Ron's Pet., pp. 6-7), a point the Government does not even attempt to challenge. Ron then argued, and now argues, that his conviction should be reversed because his ability to impeach Hagins at the trial was effectively destroyed by the ploy adopted by the Government upon Hagins' appearance before the grand jury, where the Government did not allow Hagins to tell his story directly to the grand jury, but relied instead upon Hagins' "attestation" to the "correctness" of an F.B.I. agent's report of what Hagins had allegedly told the agent previously.

In effect, therefore, Ron does attack the sufficiency of the only evidence against him, since he attacks the validity of Hagins' entire trial testimony under the circumstances that such testimony was presented. In this respect, it should be noted that in his petition herein, Ron not only challenges the judgment against him as unconstitutional under the Fifth Amendment, on the ground that his indictment by the grand jury was improperly and illegally obtained, but under the Sixth Amendment as well, on the ground that his conviction by the petit jury was also improperly and illegally obtained, because he could not effectively impeach the Government's witness, Hagins, when the latter testified against him at his trial.

II

THE STATEMENT THAT HAGINS' "ATTESTATION" TO THE "CORRECTNESS" OF THE F.B.I. AGENT'S REPORT "IN EFFECT TRANSFORMS WHAT WAS HEARSAY INTO DIRECT EVIDENCE"

In its brief, the Government persists in the error made by it before the grand jury, claiming that Hagins' brief testimony before that body was the equivalent of "direct evidence" (Br., p. 9). Petitioner Ron urges this Court, more vigorously than ever, to consider the import of this egregiously erroneous argument. If the Government believes it, how can it be said that the grand jury did not also believe it? And, if the grand jury believed it, how can it be said that the grand jury was not misled and its indictment of petitioner Ron improperly and illegally obtained?

Hagins' grand jury testimony consisted only in his stating that the F.B.I. agent's report contained "a fair and accurate summary of the knowledge [Hagins had] concerning the activities it discusses" (Pet., p. 4; emphasis supplied). In the agent's report, which Hagins read just before he went into the grand jury room, was the statement that he had told the agent that Ron had asked Hagins if the warrants had been stolen, whereupon Hagins had answered affirmatively (Pet., p. 6). Hagins, although given the opportunity, never so testified at the trial (Ibid.).

The more than nagging conclusion to be drawn from what transpired in the grand jury room is that what got to the grand jury, in respect of the

particular matter here under consideration, was not objective fact, but rather subjective conclusions drawn, first by the F.B.I. agent and then by Hagins -- i.e., the conclusion of the agent, after he had interviewed Hagins, that the latter, having allegedly discussed the warrants with Ron, must have told Ron that they were stolen, and the subsequent conclusion of Hagins, when he was briefly on the witness stand in the grand jury room, that the agent's report was a "summary" of Hagins' "knowledge." (Indeed, the F.B.I. agent's report has Hagins stating that "he also realized that Beck had to know the securities were stolen" [Pet., p. 6; emphasis supplied].) That, of course, reflects only Hagins' state of mind in respect of Beck, an alleged co-conspirator. Did the agent, in his enthusiasm, convert what was Hagins' state of mind in respect of Ron into objective reality? We can reasonably believe that he did so in light of Hagins' subsequent testimony before the petit jury. The critical point, however, is that Hagins' "attestation" before the grand jury of the "correctness" of the agent's report far from transforms that report into "direct evidence"; on the contrary, it merely compounds the hearsay, by giving to the grand jury Hagins' hastily formed impression of whether the agent's impression of what Hagins had previously told the agent was an accurate summary of what Hagins had actually told the agent!

The Government argues that the present case is distinguishable from United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), where it admits "a conviction was reversed and an indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence when in fact the testimony presented had been hearsay" (Br., p. 10; emphasis supplied). It would be difficult to

put into words a more succinct characterization of the relief sought by petitioner in the present case and the primary ground on which he seeks such relief.

III

THE STATEMENT THAT, BY "ATTESTING" TO THE "CORRECTNESS" OF THE AGENT'S REPORT, HAGINS MADE HIMSELF LIABLE TO IMPEACHMENT ON THE BASIS OF THE REPORT

The final statement on behalf of the Government in response to Ron's petition is little short of outrageous. It suggests that, since Hagins in effect adopted the agent's report, he could have been impeached on the basis of that report, just as if the report had been his own testimony (Br., p. 9).

That suggestion is patently erroneous even as a general proposition, since, quite obviously, a witness in Hagins' position can divorce himself from particular language used in an agent's notes, and can even divorce himself from the substantive import of particular statements in those notes, without doing much, if any, damage to his credibility. Indeed, Hagins did so at the trial on some occasions when the attorneys for defendants other than Ron sought to impeach him on the basis of the agent's report.

It is when, however, the Government's suggestion is applied to the particular facts of Ron's case that it becomes outrageous. The most critical

divergence between the agent's report and Hagins' testimony at the trial related to what Hagins had told Ron concerning the warrants. According to the agent's report, Hagins had told Ron the warrants were stolen, but Hagins refused to testify to that effect at the trial. At first glance, perhaps, that is a divergence that could have been used to impeach Hagins' credibility. After only brief consideration, however, it becomes quite clear that it could have been used only at the risk of bringing to the (trial) jury's attention a statement concerning Ron's alleged guilty knowledge that would have been as damaging as it was untrue!

Conceivably, it might be argued that the same result might have obtained if the Government had not resorted to the ploy of having Hagins "attest" to the "correctness" of the agent's report, but had allowed him to tell his story directly to the grand jury. Any such argument, however, merely serves to emphasize the vice of the Government's improper strategy. It seems quite clear that had Hagins been allowed to tell his story directly to the grand jury, he would not have told that body that he had informed Ron the warrants had been stolen, since he did not so testify before the petit jury.

Nor can the Government counter the foregoing with the argument that, had Hagins told his story directly to the grand jury, there would not have been the startling divergence referred to hereinabove, and thus his grand jury testimony could not have been used to impeach him. That argument begs the question. It is the essence of petitioner Ron's position that had Hagins been allowed to testify before the grand jury, there might

have been any number of other inconsistencies between that testimony and his trial testimony that might have been used to impeach his credibility.

That Hagins' credibility is open to question is not just a theoretical proposition. It is a matter of record that shortly after Ron filed his petition in this Court, Beck and Champion, who were tried with Ron, were retried together with Lester, the alleged leader of the conspiracy, who was in jail in Canada at the time of the first trial, and that all three were acquitted! Thus, Ron, who, even according to the Government's case, played the smallest part of any participant in the sale of the warrants (as opposed to the alleged theft of those securities, in which he concededly had no part) faces a ten-year jail sentence, based on Hagins' testimony, while Beck, who actually arranged the sale, and Lester, who was the alleged "mastermind," have been absolved of any legal guilt!

In light of the foregoing, petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM J. BUTLER and
STANLEY GELLER
Counsel for Petitioner
400 Madison Avenue
New York, N.Y. 10017

Dated, New York, New York
April 9, 1974